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IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

CRIMINAL APPEAL NO. 1060 /2003

APPELLANT	Raj Kumar
IN JAIL	S/o. Bhukhaou Ram Sahu
	aged about 24 years,
	R/o. Saraswati Nagar, Durg (C.G.)

VERSUS

RESPONDENT	The State of Chhattisgarh
	Through P.S. Pulgaon, District -Durg(C.G.)

S.T.No. 268/2002

Offence U/S. 392,397/34 of I.P.C.

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.1060/2003

Rajkumar

Vs.

State of Chhattisgarh

Cr.Appeal No. 1033/2003

Rekhchand & others

Vs.

State of Chhattisgarh

PRESENT: -

Shri Abhay Tiwari with Shri R.K. Jain, learned counsel for the accused-appellants.

Shri U.K.S.Chandel, Panel Lawyer for the State.

J U D G M E N T

(Delivered on 12-01-2006)

Per Dilip Raosaheb Deshmukh, J.

1. This order shall govern Cr. Appeal No.1060/2003 preferred by Rajkumar and Cr. Appeal No.1033/2003 preferred by Rekh Chand & Shankar. All the three appellants named above were convicted by Shri A.K.Samantray, Ist Additional Sessions Judge, Durg in Sessions Case No. 268/2002 vide judgment dated 26-08-2003 whereby the appellant Rajkumar was

convicted for offences punishable under Section-392 read with Section-397 of the I. P.C. and was sentenced to rigorous imprisonment for 7 years and fine of Rs.500/- in default of payment of fine to undergo further rigorous imprisonment for 1 month and the appellants Rekhchand & Shankar were convicted for the offences punishable under Section-392 read with Section-34 of the I.P.C. and were sentenced to rigorous imprisonment for 6 years and fine of Rs.500/- in default of payment of fine to undergo further rigorous imprisonment for one month.

2. Briefly stated the prosecution story is that on the intervening night of 25th & 26th March, 2002 at Village-Baghera, P.S. Pulgaon, Sheshnarayan PW-2 and his wife Janak Dulari PW-3 were sleeping inside their house. The lantern was dimly lit. Due to summer season, the main door of the house was open. At about 12.30 A.M., they woke up on hearing noise and saw three persons inside their house whom they later identified to be the appellants. The appellant Rajkumar had a sword like weapon which he put on the throat of Sheshnarayan and demanded money. Janak Dulari PW-3 also woke up and handed over the

keys of the Almirah to the appellants. The appellants opened the almirah and looted Rs. 10,000/- there from. They also removed the Mangal Sutra and Golden Tops worn by Janak Dulari along with some silver articles, 1 Transistor and wrist watch. The hands of Sheshnarayan were tied with a cloth by the appellants who ran away.

3. At about 1.30 A.M., Sheshnarayan PW-2 lodged F.I.R. Ex.P-2 in Police Station-Pulgaon. During investigation vide Ex.P-7 one wrist watch and knife were seized from the appellant Rajkumar on 04-04-2002. Prior to that on 31-03-2002 vide Ex.P-15 Rs. 941/- were seized from the appellant Rekhchand and on the same day one Transistor and Rubber Slippers were seized from the appellant Shankar vide Ex. P-17. Appellants Rekhchand & Shankar were arrested on 31-03-2002 while the appellant Rajkumar was arrested on 04-04-2002. The test identification parade of the appellant Rajkumar was conducted inside the District Jail, Durg by Nayab Tahsildar G.R. Nagesh P.W.-1. Sheshnarayan PW-2 and Janak Dulari PW-3 identified the appellant Rajkumar vide identification memo Ex.P-1. The test identification of Rekhchand &

Shankar was conducted by Corporator Likhan Sahu Vide Ex.P-5 on 01-04-2002. Sheshnarayan PW-2 & Janak Dulari PW-3 identified both the abovementioned appellants. During investigation vide seizure memo Ex.P-11 Silver Ornaments, One Mangal Sutra & One pair of Golden Tops were recovered from Gyanchand Jain of Chandanmal Bothra Jewellers, Sadar Bazar, Durg. The receipt Ex.P-11 A (a) & Ex.P-11 B (b) were also seized showing that one Mehatru had pledged these ornaments with Gyanchand. On 01-04-2002 one Mangal Sutra, one pair of golden tops and the silver ornaments were subjected to test identification by Likhan Sahu PW-5. Sheshnarayan PW-2 & Janak Dulari PW-3 identified the ornaments. After completion of investigation, the appellants were prosecuted for the offences punishable under Section-392 read with Section-397 & Section-34 of the I.P.C. The accused-appellants abjured the guilt, pleaded false implication and examined 3 witnesses in defence. The prosecution examined as many as 10 witnesses. Relying upon the evidence led by the prosecution, the trial Court convicted & sentenced the appellants as shown in para-1 (Supra).

4. Shri Abhay Tiwari, learned counsel appearing on behalf of the accused-appellants Rekhchand & Shankar and Shri R.K. Jain, learned counsel appearing for the appellant Rajkumar have contended that the prosecution has failed to establish the charges under Section-392 read with Section-397 and Section-34 of the I.P.C. against the appellants. The evidence of Janak Dulari PW-3 showed that at the time of occurrence there was darkness inside the house since the Lantern was very dimly lit. Thus, it is extremely doubtful that Sheshnarayan and Janak Dulari could have identified the appellants. It was next contended that it has not been proved that the appellants or anyone of them had pledged the ornaments with Gyanchand PW-6. The F.I.R. Ex.P-2 showed with one Rs. 10,000/-, one Mangal Sutra and a pair of golden tops had been looted. None of these articles were recovered from the appellants. So far as the identification of appellant Rajkumar Vide Ex.P-1 and appellants Rekhchand & Shankar vide Ex.P-5 is concerned, the evidence clearly shows that the Police was present during test identification which completely vitiates the test identification. So far as the identification of the ornaments are concerned, the

testimony of Sheshnarayan PW-2 & Janak Dulari PW-3 clearly showed that no other ornaments were mixed at the time of test-identification, thus rendering the test identification futile. It was also contended that arrest memo Ex.P-10 showed that appellant Rekhchand was arrested on 31-03-2002 and whereas another arrest memo was on record to show that the appellant Rekhchand had been arrested on 01-04-2002. So far as the wrist watch seized from the appellant Rajkumar and Transistor seized from the appellant Shankar is concerned, these articles were not subjected to any test identification. It was argued that the evidence led by the prosecution does not establish the guilt of the appellants beyond doubt. On the other hand, Shri U.K.S.Chandel, Panel Lawyer appearing on behalf of the State supported the judgment of the trial Court.

5. Having considered the rival submissions, I have gone through the record of Sessions Case No. 268/2002. The F.I.R. lodged by Sheshnarayan PW-2 who is an Advocate, clearly mentions that only Rs. 10,000/-, Mangal Sutra and a pair of golden tops worn by his wife Janak Dulari PW-3 had been looted. No other silver ornaments or Transistor were shown to have

been looted at the time of lodging the F.I.R. So far as the recovery of ornaments from Jewellers Gyanchand PW-6 is concerned; this witness is in para-6 clearly stated that one Mehataru had pledged these ornaments with him and he could not identify the said person. In Para-12 he has also admitted that Rekhchand & Shankar had not pledged the said ornaments with him. So far as the test identification of the ornaments recovered from Gyanchand PW-6 is concerned, Sheshnarayan PW-2 is in para-9 and Janak Dulari PW-3 is in para-9 have clearly admitted that no ornaments were mixed at the time of identification and only her ornaments were shown to them. This renders the test identification worthless. Both these witnesses also admit that Police was present at the time of test identification of the ornaments. They also admit that the police was present at the time of identification of appellants. Thus, the presence of police during test identification completely vitiates the test identification of the appellants as well as of the ornaments.

6. Janak Dulari PW-3 had also admitted in para-10 that during night the lantern was very dimly lit. Since,

Sheshnarayan & Janak Dulari did not know the appellants prior to the occurrence, it seems highly doubtful that they could identify the appellants in the dim light of the lantern.

7. Thus, the evidence led by the prosecution reveals the following :-

(A) It is plausible that the appellants could not have been identified by Sheshnarayan PW-2 & Janak Dulari PW-3 in the dimly lit lantern at night, at the time of occurrence.

(B) There is no evidence to show that the ornaments seized from the Jewellers Gyanchand PW-6 were pledged by the appellants or any one of them.

(C) The evidence relating to test identification of the appellants is vitiated due to the admitted presence of police.

(D) The test identification of the articles is also vitiated not only on account of the presence of police but also on account of the fact that no other similar articles were mixed.

(E) None of the looted article mentioned in the F.I.R. were recovered from the appellants.

8. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the prosecution has failed to establish the charge under Section-392 read with Section-397

against the appellant Rajkumar and the charge under Section-392 read with Section-34 of the I.P.C. against the appellants Rekhchand & Shankar beyond shadow of doubt.

9. In the result, Cr. Appeal No. 1060/2003 & Cr. Appeal No. 1033/2003 are allowed. The conviction of the appellant Rajkumar under Section-392 read with Section-397 and the sentence awarded thereunder and conviction of the appellants Rekhchand & Shankar under Section-392 read with Section-34 of the I.P.C. and the sentences awarded thereunder are set aside. The appellant Rajkumar is acquitted of the charge under Section-392 read with Section-397 of the I.P.C. and the appellants Rekhchand & Shankar are acquitted of the charge under Section-392 read with Section-34 of the I.P.C. Fine, if paid, shall be refunded to the appellants. The appellants shall be set at liberty forthwith, if not required in any other case.

Sd-/
Dilip Raosaheb Deshmukh
Judge

Tumane